

Orit Corporation/Sea Jet Trucking and APA Warehouse, Inc., Single and Joint Employers d/b/a Gitano Distribution Center and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO. Case 22-CA-15405

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On May 31, 1989, the National Labor Relations Board issued a Decision and Order in this proceeding.¹ On November 16, 1990, the United States Court of Appeals for the Third Circuit entered a judgment enforcing in full the backpay provisions of the Board's Order.² A controversy having arisen over the amount of backpay due the discriminatees under the Board's Order, the Regional Director for Region 22 on November 25, 1992, issued and caused to be served on the parties a compliance specification and notice of hearing alleging the amounts of backpay due under the terms of the Board's Order, and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. On January 11, 1993, the Respondent filed its answer to the compliance specification. Subsequently, by letter dated February 10, 1993, the General Counsel advised the Respondent that its answer was deficient in certain respects, and that the General Counsel would file a Motion for Partial Summary Judgment if a proper answer was not filed by February 19, 1993. The Respondent did not amend its answer.

Thereafter, on March 1, 1993, the General Counsel filed a Motion for Partial Summary Judgment, with exhibits attached. The General Counsel submits that portions of the Respondent's answer to the compliance specification are not in compliance with Section 102.56(b) and (c) of the Board's Rules and Regulations. Therefore, the General Counsel moved that partial summary judgment be granted. On March 5, 1993, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent has not filed a response to the Notice to Show Cause.

On the entire record in this case, the Board makes the following

**Ruling on the Motion for Partial Summary
Judgment**

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

¹ 294 NLRB 695 (1989).

² No. 89-1410 (unpublished decision).

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.* . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The specification duly served on the Respondent states that, pursuant to Section 102.56 of the Board's Rules and Regulations:

the Respondent shall within 21 days from the date of this Specification file . . . an Answer to this Specification. To the extent that such answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them.

In paragraph 2 the specification alleges that an appropriate measure of the quarterly gross backpay the discriminatees would have received during the backpay period is the product of the average weekly regular hours worked by the discriminatees prior to the backpay period, plus the average overtime hours worked by comparable employees during a representative period

prior to and during the backpay period, multiplied by the number of weeks in each quarter times the wage rate the discriminatees would have received during the backpay period.³ The Respondent's answer to paragraph 2 objects to the premises for the foregoing formula for determining gross backpay, asserting instead that the appropriate measure is the hours worked by comparable employees during the backpay period.

We find that the answer is deficient insofar as it purports to deny the appropriateness of the formula for calculating gross backpay set forth above. Those denials are insufficient because they do not offer or set forth any details concerning an alternative formula for computing the backpay amount and do not provide any appropriate alternative figures.⁴ Thus, we agree with the General Counsel that paragraph 2 of the Respondent's answer fails to comply with the requirements of Section 102.56(b) and (c) and that paragraphs 3(b), 4, 5, 7, 8, 9, and 10, which incorporate by reference the Respondent's answer to paragraph 2, are similarly defective.

With the exception of the amount of the discriminatees' interim earnings and the adequacy of their efforts to mitigate their damages, the Respondent has either admitted all other allegations in the specification or denied them in a manner insufficient under Section 102.56(b) and (c) of the Board's Rules and Regulations. Therefore, we deem the Respondent to have admitted those other allegations to be true. Accordingly, we shall grant the General Counsel's Mo-

tion for Partial Summary Judgment and shall direct a hearing limited to determining the amount of the discriminatees' interim earnings, and to the adequacy of their efforts to mitigate damages.

ORDER

It is ordered that the General Counsel's Motion for Partial Summary Judgment is granted except with regard to the allegations concerning the amount of the discriminatees' interim earnings and efforts to mitigate damages.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 22 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning the amount of the discriminatees' interim earnings and mitigation of damages. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 9, 1993

James M. Stephens,	Chairman
--------------------	----------

Dennis M. Devaney,	Member
--------------------	--------

John Neil Raudabaugh,	Member
-----------------------	--------

(SEAL)

NATIONAL LABOR RELATIONS BOARD

³The specification alleges that a combination formula incorporating hours worked by discriminatees and by comparable employees is appropriate because the Respondent did not have complete payroll records, for the entire backpay period, for comparable employees, and did not have payroll records for the discriminatees for a 1-year period prior to the strike.

⁴See, e.g., *J. Huizinga Cartage Co.*, 308 NLRB No. 23 (July 31, 1992); *Heck's, Inc.*, 282 NLRB 263 (1986).